

impeachment, and a determination of whether certain offenses constitute "Treason, Bribery, or other high Crimes and Misdemeanors" is necessarily a part of the House's decision to impeach a president. While the Senate's exclusive power to try, convict, and remove a president makes it the final arbiter of whether the conduct alleged is "impeachable," I believe it is incumbent on the Senate to permit the House Managers a reasonable opportunity to set out their case against the President before making a decision on that question. Whatever misgivings I may have about the way the House exercised its constitutional power to impeach in this instance, I felt compelled to permit the House Managers a reasonable opportunity to make their case before I would exercise my role as both a trier of fact and a judge of law.

Second, the historical and legal authorities on the question of what constitutes "other high Crimes and Misdemeanors" are varied and not wholly consistent. I believed that I could apply those authorities with more certainty to a clear and complete set of facts, after hearing the evidence, than to a set of allegations that might never be proved. I recognize that when courts entertain motions to dismiss in civil cases, they assume that all facts alleged in a complaint are true and determine the scope and impact of the particular statute or legal doctrine on which the claim for relief is based. But in this case, I felt more comfortable reaching the legal question of "impeachability" after hearing the evidence. I was comfortable allowing this limited deference to the prerogatives of the House Managers in the interest of a thorough and constitutional process.

Having decided that the House Managers failed to prove that the President committed the federal crimes they alleged, the question remains whether the underlying acts themselves, whether criminal or not, constitute conduct that under the Constitution constitute "high Crimes and Misdemeanors" that should result in the President's removal from office. On the issue of what constitutes "high Crimes and Misdemeanors," as in many other issues in this impeachment and trial, there has been heated and polarizing rhetoric. The House Managers and their supporters argued vigorously that the criminal acts they charged were, on their face, high crimes. White House counsel and many historians and legal scholars argued the contrary, that these acts could in no way be considered high crimes.

Other than bribery and treason, the Constitution itself gives no exhaustive or exclusive list of those offenses for which presidents should be removed from office. We are given only the phrase "other high Crimes and Misdemeanors" for guidance. The key to understanding the meaning of this phrase in my view are the words "other" and "high."

As University of Chicago Law School Professor Joseph Isenbergh has written:

"* * * without the word 'high' attached to it, the expression 'crimes and misdemeanors' is nothing more than a description of public wrongs, offenses that are cognizable in some court of criminal jurisdiction."

Isenbergh notes that in the 18th Century, the word "high" when attached to the word "crime" or "misdemeanor," described a crime aiming at the state or the sovereign rather than a private person, and thus a "high Crime or Misdemeanor" was not simply a serious crime, but one aimed at the highest powers of the state. This concept had been asserted by William Blackstone and others, and was well understood by the Framers of the Constitution.

Indeed, Alexander Hamilton wrote in *Federalist* Paper No. 65 that the crimes to be considered in a court of impeachment are:

"[T]hose offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with particular propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

Writing at the time of the Nixon impeachment, Yale University Law Professor Charles Black commented that the crimes enumerated in the Constitution, treason and bribery, are crimes that "so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator." In my view, "other high Crimes and Misdemeanors" must be interpreted as crimes or acts of a similar gravity and impact on society as those enumerated crimes.

To determine whether the conduct that led to impeachment for these crimes meets the definition of a high crime, the underlying circumstances must govern and a determination must be made if the offense, in Black's words, "threatens the order of political society." While it is certainly true that an act need not be criminal in a technical sense to constitute a threat to the well-being of the State, the acts in this case were not assaults on the State or the liberties of the people that threaten the order of political society, as contemplated by the Framers. This conduct does not justify overturning the will of the people as expressed in the 1996 election.

IV. CONCLUSION

As I listened carefully to the trial proceedings over the past month, I was impressed with the efforts of counsel for both sides in making their cases. Even understanding the role of counsel as advocates, however, I was troubled by the exaggerated claims with regard to the strength of each side of the case.

The House Managers referred to the evidence in support of removal as "overwhelming," while the President's counsel described the House Managers' evidence as "nonexistent." I find neither statement to be true and maybe a little reminiscent of the heated words of the Senator Charles Sumner of Massachusetts in his Opinion following the impeachment trial of President Andrew Johnson:

"In the judgment which I now deliver I cannot hesitate. To my vision the path is clear as day. Never in history was there a great case more free from all just doubt. If Andrew Johnson is not guilty, then never was a political offender guilty before; and, if his acquittal is taken as a precedent, never can a political offender be found guilty again. The proofs are mountainous. Therefore, you are now determining whether impeachment shall continue a beneficent remedy in the Constitution, or be blotted out forever, and the country handed over to the terrible process of revolution as its sole protection."

I cannot view the Clinton impeachment case from either extreme. This, unfortunately, was a close case that raised the very real specter of the nullification of an American presidential election. It is, however, at such a moment, when the high standard for impeachment and conviction becomes especially important.

The reason I describe the decision of the American people to elect a president as the most salient fact in this case is not simply because it is the right of the American people to choose their president. It is also be-

cause of the constitutional goal of our Founding Fathers to create a system of political stability. Just as the Framers wished to avoid the uncertainty of a parliamentary system, we today in this last year of the twentieth century should be concerned about political instability and the threat that excessive partisanship poses to our constitutional order.

I see the four year elected term of our president as a unifying force in our country. Yet this is the second time in my adult life that a President of the United States has undergone a serious impeachment process. And I am only 45 years old. In the nearly two hundred years prior to the case of President Nixon, this happened only once.

Are these two recent impeachments a fluke? Is it coincidence that two of our recent presidents were thought by some to be sufficiently unfit to be president to warrant this procedure? I wonder how we will feel about the stability of our system if another presidential impeachment occurs sometime in the next ten or twenty years.

I see a danger in this. I see a danger in this in an increasingly diverse country. I see a danger in this in an increasingly divided country. I see a danger when national elections seem never to be over. I see a danger when the lead House Manager in his concluding remarks in this trial asserts that we are engaged in a "culture war" in this country. I hope that is not where we are, and I hope that is not where we are heading.

In making a decision of this magnitude, it is best not to err at all. If we must err, however, we should err on the side of avoiding such divisions, and of respecting the will of the people. Senator James W. Grimes of Iowa, one of the seven Republicans who voted to acquit President Andrew Johnson in 1868, said in his Opinion at the conclusion of the trial:

"I cannot agree to destroy the harmonious working of the Constitution for the sake of getting rid of an unacceptable President. Whatever may be my opinion of the incumbent, I cannot consent to trifle with the high office he holds. I can do nothing which, by implication, may be construed into an approval of impeachment as a part of future political machinery."

Spoken almost 131 years ago, these words express nearly perfectly my sentiments on the grave constitutional questions I was required to address in this case.

MEASURES REFERRED

The following bills, previously received from the House of Representatives for the concurrence of the Senate, were read the first and second times by unanimous consent and referred as indicated:

H.R. 68. An act to amend section 20 of the Small Business Act and make technical corrections in title III of the Small Business Investment Act; to the Committee on Small Business.

H.R. 98. An act to amend chapter 443 of title 49, United States Code, to extend the aviation war risk insurance program and to amend the Centennial of Flight Commemoration Act to make technical and other corrections; to the Committee on Governmental Affairs.

H.R. 169. An act to amend the Packers and Stockyards Act, 1921, to expand the pilot investigation or the collection of information regarding prices paid for the procurement of cattle and sheep for slaughter of muscle cuts

of beef and lamb to include swine and muscle cuts of swine; to the Committee on Agriculture, Nutrition, and Forestry.

H.R. 391. An act to amend chapter 35 of title 44, United States Code, for the purposes of facilitating compliance by small business with certain Federal paperwork requirements, to establish a task force to examine the feasibility of streamlining paperwork requirements applicable to small business, and for other purposes; to the Committee on Governmental Affairs.

H.R. 432. An act to designate the North/South Center as the Dante B. Fascell North-South Center; to the Committee on Foreign Relations.

H.R. 437. An act to provide for a Chief Financial Officer in the Executive Office of the President; to the Committee on Governmental Affairs.

H.R. 439. An act to amend chapter 35 of title 44, United States Code, popularly known as the Paperwork Reduction Act, to minimize the burden of Federal paperwork demands upon small business, educational and nonprofit institutions, Federal contractors, State and local governments, and other persons through the sponsorship and use of alternative information technologies; to the Committee on Governmental Affairs.

H.R. 440. An act to make technical corrections to the Microloan Program; to the Committee on Small Business.

MEASURE PLACED ON THE CALENDAR

The following bill was read twice and placed on the calendar:

H.R. 435. An act to make miscellaneous and technical changes to various trade laws, and for other purposes.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-1748. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-539, "Motor Vehicle Parking Regulation Temporary Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1749. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-553, "Child Abuse and Neglect Prevention Children's Trust Fund Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1750. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-561, "Drug Prevention and Children at Risk Tax Check Off, Tax Initiative Delay, and Attorney License Fee Act of 1998"; to the Committee on Governmental Affairs.

EC-1751. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-559, "Harris/Hinton Place and Bishop Samuel Kelsey Way Designation Act of 1998"; to the Committee on Governmental Affairs.

EC-1752. A communication from the Chairman of the Council of the District of Colum-

bia, transmitting, pursuant to law, a report on D.C. ACT 12-558, "Schedule of Heights of Buildings Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1753. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-573, "Self-Sufficiency Promotion Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1754. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-568, "Fiscal Year 1999 Disability Compensation Administrative Financing Temporary Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1755. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-567, "Health-Care Facility Unlicensed Personnel Criminal Background Check Act of 1998"; to the Committee on Governmental Affairs.

EC-1756. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-563, "Lowell School, Inc., Real Property Tax Relief Temporary Act of 1998"; to the Committee on Governmental Affairs.

EC-1757. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-582, "Homestead Housing Preservation Temporary Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1758. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-581, "Year 2000 Government Computer Immunity Act of 1998"; to the Committee on Governmental Affairs.

EC-1759. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-577, "Procurement Practices Bid Notice Period Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1760. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-575, "Human Rights Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1761. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-587, "Compensation Increase for the Chairperson of the Rental Housing Commission Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1762. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-586, "Sex Offender Registration Risk Assessment Clarification Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1763. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-584, "Housing Finance Agency Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1764. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-583, "Community Development Program Temporary Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1765. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-593, "Hazardous Duty Compensation for Metropolitan Police Department Scuba Divers Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1766. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-591, "Dedication and Designation of Harry Thomas Way Temporary Act of 1998"; to the Committee on Governmental Affairs.

EC-1767. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-589, "Sex Offender Registration Immunity From Liability Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1768. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-588, "Mentally Retarded Citizens Substituted Consent for Health Care Decisions and Emergency Care Definition Temporary Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1769. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-606, "Reorganization Plan No. 5 for the Department of Human Services and Department of Corrections Act of 1998"; to the Committee on Governmental Affairs.

EC-1770. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-603, "Child Development Home Promotion Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1771. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-602, "Food Stamp Trafficking and Public Assistance Fraud Control Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1772. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-601, "Retired Police Officer Redeployment Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1773. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-612, "Legal Service Establishment Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1774. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-611, "Home Purchase Assistance Fund Amendment Act of 1998"; to the Committee on Governmental Affairs.

EC-1775. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-610, "Home and Community Juvenile Probation Supervision Act of 1998"; to the Committee on Governmental Affairs.

EC-1776. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-608, "Criminal Records Check for the Protection of Children Act of 1998"; to the Committee on Governmental Affairs.

EC-1777. A communication from the Chairman of the Council of the District of Columbia, transmitting, pursuant to law, a report on D.C. ACT 12-615, "Second Omnibus Regulatory Reform Amendment Act of 1998"; to the Committee on Governmental Affairs.